

STATE OF MICHIGAN
COURT OF APPEALS

JACKIE BROMLEY, KELLY JANOWIAK, ANN
TURK, and HELEN SMITH,

UNPUBLISHED
February 18, 2014

Plaintiffs-Appellants,

v

RONALD A. MALLISON, SR. and ALICE
MALLISON,

No. 312901
Mason Circuit Court
LC No. 12-000249-CZ

Defendants-Appellees.

Before: BOONSTRA, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order dismissing their amended complaint pursuant to MCR 2.116(C)(7) on the ground that it was barred by the statute of limitations. We affirm.

On August 6, 2012, plaintiffs filed their amended complaint alleging that, when they were children in the 1970s, they were sexually abused by defendant, Ronald Mallison, and his wife, defendant Alice Mallison, knew or should have known about the abuse. Their amended complaint set forth assault and battery, negligence, and intentional infliction of emotional distress claims. Plaintiffs averred that this case was timely filed because they had repressed their memories regarding the abuse and only recently had met together and recounted their individual experiences. Plaintiffs also alleged that defendant Ronald had “made contemporary admissions within the past twelve (12) month period of this behavior.”

In response to plaintiffs’ amended complaint, defendants filed a motion to dismiss pursuant to MCR 2.116(C)(7), arguing that the case was clearly barred by the statute of limitations. In support of their argument, defendants cited to *Lemmerman v Fealk*, 449 Mich 56; 534 NW2d 695 (1995), which specifically held that applicable statute of limitation periods are not extended, either by the discovery rule or the statutory grace period for persons suffering from insanity, in cases alleging repressed memory of sexual abuse. See also *Guerra v Garratt*, 222 Mich App 285, 291; 564 NW2d 121 (1997). Thus, defendants argued, plaintiffs’ claims were time-barred and must be dismissed.

Plaintiffs’ opposed the dismissal motion, arguing that because the sexual abuse allegations were corroborated by the four plaintiffs and defendant “admitted” the abuse, the holding in *Meirs-Post v Schafer*, 170 Mich App 174, 175; 427 NW2d 606 (1988), which

involved corroborated claims, was more applicable to this matter than the holding in *Lemmerman*, which involved uncorroborated claims. Plaintiffs also argued that this matter should be allowed to proceed under the discovery rule because the fact of harm was not realized by them until years after the abuse occurred. And, plaintiffs argued, the cause of action for sexual abuse was fraudulently concealed by defendant Alice because she convinced one of the plaintiffs that she was mistaken about what happened to her; thus, that plaintiff was prevented from timely knowing that a cause of action existed. Accordingly, plaintiffs argued, their claims were not time-barred and defendants' motion to dismiss should be denied.

Following oral arguments, the trial court granted defendants' motion to dismiss. The trial court noted that our Supreme Court in *Lemmerman* rejected the arguments raised by plaintiffs. Thereafter, an order dismissing the case with prejudice was entered. This appeal followed.

We review de novo a trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(7). *Rheaume v Vandenberg*, 232 Mich App 417, 420-421; 591 NW2d 331 (1998). We consider all affidavits, pleadings, and other documentary evidence submitted by the parties and the pleadings are construed in the plaintiff's favor. *Id.* at 421. "Whether a cause of action is barred by a statute of limitations is, absent disputed issues of fact, a question of law;" thus, our review is de novo. *Colbert v Conybeare Law Office*, 239 Mich App 608, 613-614; 609 NW2d 208 (2000).

Plaintiffs raise several related arguments on appeal challenging the trial court's dismissal of this action. In particular, plaintiffs argue that (1) the rulings in *Meiers-Post* and *Lemmerman* allow corroborated claims of childhood sexual abuse to proceed despite the running of the statute of limitations; (2) the rulings in *Meiers-Post* and *Lemmerman* allow claims of childhood sexual abuse that are supported by the admissions of a defendant to proceed despite the running of the statute of limitations; and (3) the discovery rule and the insanity/minority savings provision, MCL 600.5851(5), apply to extend the applicable statute of limitation periods in a sexual abuse context.

In *Lemmerman*, our Supreme Court was "asked . . . to extend the limitation period for the civil actions brought by plaintiffs who allege they were sexually abused as children by the defendants, but were unable to timely file claims because of repression of the memory of abuse." *Lemmerman*, 449 Mich at 60. The issues to be decided by the *Lemmerman* Court were (1) whether "the discovery rule is applicable to determine the time of accrual of the claims triggering the running of the limitation period for plaintiffs' tort actions of assault and battery, negligence, and intentional infliction of emotional distress," and (2) whether "the limitation period can be extended by the one-year statutory grace period allowed after removal of the disability of insanity under MCL 600.5851(1)." *Id.* at 60. The *Lemmerman* Court held "that neither the discovery rule nor the insanity disability statute addresses the exception claimed to extend the time allowable for bringing suit in these cases. The question of tolling the allowable time for bringing claims allegedly due to repressed memory is appropriately addressed to the Legislature." *Id.*

Specifically, the *Lemmerman* plaintiffs argued "that the statute of limitations is tolled because either the discovery rule or the insanity disability grace period serves to extend the limitation period for claims by adults of childhood sexual abuse that has been repressed from the

victims' active memories." *Lemmerman*, 449 Mich at 64-65. With regard to the discovery rule, the *Lemmerman* Court held:

In those instances in which we have applied the common-law discovery rule to extend the statute of limitations, the dispute between parties has been based on evaluation of a factual, tangible consequence of action by the defendant, measured against an objective external standard. The presence of this external standard addresses the concern for reliable fact finding that is the underlying rationale for precluding untimely claims. Unlike the present claims, where liability must be determined solely by reference to one person's version of what happened as against another's, the factfinder's determination of liability is measured against an objective standard of care, such as the standard of care in the relevant profession or industry, at the time of the injury. Thus, despite the passage of time, an objective standard can be recreated for evaluation by the factfinder. [*Id.* at 68.]

The *Lemmerman* Court concluded that the discovery rule does not apply to extend the limitation period for repressed memory cases, holding as follows:

It is proper to apply the discovery rule in cases where the objective nature of the evidence makes it substantially certain that the facts can be fairly determined even though considerable time has passed since the alleged events occurred. Such circumstances simply do not exist where a plaintiff brings an action based solely on an alleged recollection of events which were repressed from her consciousness and there is no means of independently verifying her allegations in whole or in part. If we applied the discovery rule to such actions, the statute of limitations would be effectively eliminated and its purpose ignored. A person would have an unlimited time to bring an action, while the facts became increasingly difficult to determine. The potential for spurious claims would be great and the probability of the court's determining the truth would be unreasonably low. [*Id.* at 74-75, quoting *Tyson v Tyson*, 107 Wash2d 72, 79; 727 P2d 226 (1986).]

The *Lemmerman* Court also rejected the argument that the insanity disability grace period applied to extend the statute of limitations. The Court noted that, generally, in those cases in which the insanity grace period had been applied, "there was a factually verifiable consequence of some action by the defendant, as well as an objective external standard against which to measure the defendant's conduct." *Id.* at 73. The factually verifiable consequences discussed by the *Lemmerman* Court included accident-based insanity arising from an automobile accident, *id.* at 71, traumatic insanity due to a workplace accident, *id.* at 72, and a lifelong mental infirmity, *id.* at 73. It appears that the *Lemmerman* Court did not consider "repressed memory" a possible "factually verifiable consequence" because it held that, "given the state of the art regarding repressed memory and the absence of objective verification," a factfinder could not fairly and reliably resolve the questions of fact before them. *Id.* at 76. Accordingly, the *Lemmerman* Court concluded:

[N]either the discovery rule nor the statutory grace period for persons suffering from insanity extends the limitation period for tort actions allegedly

delayed because of repression of memory of the assault underlying the claims. While the Legislature may ultimately resolve the threshold reliability question in favor of plaintiffs claiming repressed memories, neither device is presently available to extend the limitation period for repressed memory tort actions, even upon presentation of allegedly “objective and verifiable evidence” of a plaintiff’s claim. [*Id.* at 76-77.]

Here, however, plaintiffs argue that footnote fifteen in the *Lemmerman* opinion supports their argument that the limitation periods were tolled in this case. The footnote states:

We do not address the result of those repressed memory cases wherein long-delayed tort actions based on sexual assaults were allowed to survive summary disposition because of the defendants’ admissions of sexual contact with the plaintiffs when they were minors. *Meiers-Post* [170 Mich App at 174]; *Nicolette v Carey*, 751 F Supp 695 (WD Mich, 1990). Such express and unequivocal admissions take these cases outside the arena of stale, unverifiable claims with which we are concerned in the present cases. [*Lemmerman*, 449 Mich at 77 n 15.]

In *Meiers-Post*, 170 Mich App at 176, 182, the defendant admitted in his deposition that he had a sexual relationship with the plaintiff when she was a minor. In *Nicolette*, 751 F Supp at 699-700, the defendant wrote a letter to the plaintiff discussing three or four incidents of sexual contact he had with the plaintiff when she was a child.

In *Guerra*, 222 Mich App at 285, this Court specifically considered the argument “that footnote 15 creates an exception to *Lemmerman*’s general holding” that the discovery rule and insanity disability grace period do not apply in “cases involving ‘express and unequivocal admissions.’” *Id.* at 290. The *Guerra* Court concluded that “footnote 15 addresses the retroactivity of *Lemmerman* and does not articulate an exception to its general holding that neither the discovery rule nor the statutory grace period for persons suffering from insanity extends the limitation period for tort actions delayed by alleged ‘repressed memory.’” *Id.* at 292. We are required by MCR 7.215(J)(1) to follow the holding in *Guerra*. See also *Demeyer v Archdiocese of Detroit*, 233 Mich App 409, 416; 593 NW2d 560 (1999).

Plaintiffs argue that the facts in this case are more like the facts in the *Meiers-Post* case than the facts in the *Lemmerman* case because plaintiffs have a similar or the same memories of sexual abuse perpetrated against them by defendant Ronald; thus, their claims are corroborated. Plaintiffs also argue that their claims “are further supported by [Ronald’s] admissions; evidence at trial will show that [Ronald] admitted to trusted family members the truth of the Plaintiffs’ allegations.” However, first, the fact that all four plaintiffs may have similar or the same “repressed memories” of sexual abuse allegedly perpetrated against them by defendant Ronald does not constitute objective corroborating evidence making “it substantially certain that the facts can be fairly determined even though considerable time has passed since the alleged events occurred.” *Lemmerman*, 449 Mich at 74-75, quoting *Tyson*, 107 Wash2d at 79. The problem addressed in *Lemmerman* remains in this case because the factfinder would be faced with determining liability based solely on plaintiffs’ allegations of what happened versus defendants’ allegations of what happened without a means of independently verifying the allegations. *Id.* at 68, 74-75. Further, the “corroboration” discussed in *Meiers-Post* was the defendant’s own

admission, in his deposition, that he had a sexual relationship with the plaintiff when she was a minor. Second, plaintiffs' bare claim standing alone that defendant Ronald allegedly "admitted" to family members that the sexual abuse occurred is insufficient to constitute the sort of "express and unequivocal admissions" discussed in *Meiers-Post*, 170 Mich App at 176, 182, and in *Nicolette*, 751 F Supp at 699-700. Furthermore, we are bound to follow the holding in *Guerra* as discussed above, although plaintiffs argue that *Guerra* was wrongly decided. And we are bound by the holding in *Lemmerman*; thus, we reject plaintiffs' arguments that the discovery rule and the insanity/minority savings provision operates to preserve their claims against defendants. See MCR 7.215(J)(1).

Plaintiff Janowiak also argues that her cause of action was fraudulently concealed from her by defendant Alice because, when she was a child, plaintiff Janowiak complained to Alice about the actions of defendant Ronald and Alice told her that she "must have been dreaming."

The fraudulent concealment rule set forth at MCL 600.5855 provides:

If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

Fraudulent concealment "means employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action. The acts relied on must be of an affirmative character and fraudulent." *Doe v Roman Catholic Archbishop of Archdiocese of Detroit*, 264 Mich App 632, 642; 692 NW2d 398 (2004) (citations omitted). We conclude that telling a child that she "must have been dreaming" does not constitute "fraudulent concealment" as contemplated by the statute. Accordingly, plaintiff Janowiak has failed to state a claim for fraudulent concealment that would toll the statute of limitations applicable to her claims. In summary, the trial court properly granted defendants' motion to dismiss on the ground that action was barred by the statute of limitations.

Affirmed.

/s/ Mark T. Boonstra
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald